DNA--PEOPLE'S LEGAL SERVICES

IBLA 76-526 Decided August 20, 1980

Appeal from decisions of the Geological Survey and Bureau of Indian Affairs, refusing to rescind approval of Peabody Coal Company's mining plan for Black Mesa, Arizona.

Appeal dismissed.

1. Rules of Practice: Appeals: Timely Filing--Rules of Practice: Appeals: Dismissals

   The provisions of 43 CFR 4.411, requiring that a notice of appeal to be filed within 30 days of the decision appealed from, are mandatory, inasmuch as they determine the jurisdiction of the Board to hear an appeal, and are not subject to waiver. An appeal which was not filed timely must be dismissed.

2. Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Standing to Appeal--Rules of Practice: Supervisory Authority of the Secretary

   For the purposes of the proviso to 43 CFR 4.410, which grants any party to a case a right of appeal to the Board of Land Appeals "except * * * where a decision has been approved by the Secretary," the Under Secretary is vested with the authority of the Secretary to make decisions final for the Department and thus not subject to review by the Board.

APPEARANCES: Robert L. Miller, Esq., Tuba City, Arizona, for appellant DNA--People's Legal Services, Inc.; Lawrence A. Ruzow, Esq., Vlassis, Ruzow & Linzer, Phoenix, Arizona, for the Navajo Tribe; Stephen G. Boyden, Esq., Boyden, Kennedy, Romney & Howard, Salt Lake City, Utah, for the Hopi Tribe; James W. McDade, Esq., McDade and Lee, Washington, D.C., and Gary R. Case, Esq., O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, Phoenix, Arizona, for appellee Peabody Coal Company; and Robert Uram, Esq., Office of the Solicitor, Department of the Interior, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

In February 1964 and June 1966 Peabody Coal Company, appellee herein, through its wholly owned subsidiary Sentry Royalty Company, leased two parcels of land from the Navajo Tribe and the Hopi and Navajo Tribes, respectively, on Black Mesa. These leases, covering 64,858 acres, were entered into for the development of the mineral deposits underlying the leased areas. The leases were issued for a term of 10 years and so long thereafter as coal was produced in paying quantities. Of the acreage under lease, only 14,000 acres are intended to actually be mined, representing seven-tenths of 1 percent of the entire Black Mesa acreage.

Lease No. 14-20-0603-9910 between the Navajo Tribe and Peabody Coal Company and lease No. 14-20-0450-5743 between the Hopi Tribe and Peabody Coal Company embrace land within the Joint Use area of the two tribes. Lease No. 14-20-0603-8580 between the Navajo Tribe and Peabody Coal Company embraces land solely owned by the Navajo Tribe.

Actual mining commenced in 1970, pursuant to a partial mining plan approved by the Geological Survey (GS) on March 25, 1970, which encompassed designated acreage within the Joint Use area. As additional areas were developed, supplemental mining plans were submitted and approved by GS. Peabody Coal Company was thus conducting active mining operations within its leased area when the present action commenced.

We are unable to ascertain from the records now before us exactly when appellant DNA--People's Legal Services (hereinafter DNA,) began its inquiries into this matter. 1/ At least as early as August 23,

1/ DNA purports to represent various unnamed Navajo Indians who dwell on Black Mesa, and offers "to divulge" them upon request. We would note that DNA has an affirmative obligation to establish administrative standing, and unless DNA is attempting to state that DNA--People's Legal Services has standing in its own right, it is required to name at least one person it represents who would be possessed of the requisite interest necessary to obtain standing. Because of our disposition of the "appeal" infra, we need not address this question further.

1974, DNA had written to the Navajo Area Office, Bureau of Indian Affairs (BIA), at Window Rock, Arizona, concerning the subject leases. In August 1974 and June 1975 DNA directed questions concerning operations under the leases to the Regional Office of GS. By letter of August 1, 1975, attorneys for DNA requested that GS "rescind" approval of the Peabody Mining Plan for failure to comply with the provisions of 25 CFR 177. At the same time DNA also requested that the Commissioner of Indian Affairs, BIA, contact GS and request that GS rescind approval of the Peabody Mining Plan.

By letter of August 26, 1975, the Acting Director, GS, notified appellant's attorney that the provisions of 25 CFR 177.2(c) specify that

> the regulations for the surface exploration, mining and reclamation of lands contained in Part 177 of Title 25 apply only to leases issued after the effective date of said regulations, i.e. after January 18, 1969. Our records indicate that the coal leases involved in Peabody Coal Company's mining operation on Black Mesa were issued prior to January 18, 1969.

The Acting Director noted, however, that although the provisions of 25 CFR 177 did not apply to operations under Peabody's leases, "reports similar to those required under 25 CFR 177 are periodically submitted to the Area Mining Supervisor of the Geological Survey."

By letter of October 8, 1975, the Acting Assistant Area Director, Navajo Area Office, replied on behalf of the Commissioner of Indian Affairs to DNA's August 1, 1975 letter. That letter stated, in relevant part:

> Basically, the contents and provisions of our letter of September 6, 1974, remain in effect. As indicated by you, any subsequent mining plan submitted by Peabody Coal Company will have to comply with applicable provisions of 25 CFR Part 177. By copy of this letter, we are so recommending to the U.S. Geological Survey.

The letter of September 6, 1974, referred to above, had declared:

> Although 25 CFR 177.2(c) specifically states that regulations of Part 177 shall apply only to permits and leases issued subsequent to the effective date thereof, Peabody Coal Company submitted a Mining and Reclamation Plan approved by the Secretary. The plan is being monitored by the U.S.G.S. Mining Supervisor.

By letter of November 6, 1975, DNA requested the then Secretary of the Interior, Thomas S. Kleppe, to order GS to rescind approval of

Peabody Coal Company's mining plan. In that letter, attorneys for appellant declared: "We intend this request to be in the nature of a formal demand for action."

By letter of January 5, 1976, the Acting Director, GS, responded to DNA's letter of November 6, 1975. Therein he stated: "We have determined that it would not be appropriate to rescind approval of the lessee's mining plan requested in your letter."

By submission of January 29, 1976, DNA filed a notice of appeal and statement of reasons in support thereof, with this Board. Copies of this notice and statement were also served on the Commissioner, BIA, on the Director, GS, and on the Secretary of the Interior. In its notice of appeal DNA stated: "We appeal the decisions of Mr. Kleppe and his subordinates within the United States Geological Survey and Bureau of Indian Affairs to refuse to take the actions that we have requested to them." Appellant DNA requested the following relief:

> 1. The United States Geological Survey rescind approval of Peabody Coal Company's mining plan for Black Mesa.
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> 2. The United States Geological Survey and the Bureau of Indian Affairs undertake a "technical examination" of the Black Mesa mining operation and "formulate general requirements" for the Black Mesa mining operation, as required by 25 C.F.R. § 177.4.
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> 3. The United States Geological Survey withhold approval of any future mining plan submitted by Peabody Coal Company for Black Mesa unless the plan complies fully with all of the requirements of 25 C.F.R. § 177, the mining leases, and the "general requirements" formulated for the mining operation.

By memorandum of March 15, 1976, the Associate Solicitor, Energy and Resources, Department of the Interior, requested, inter alia, that appellant DNA be ordered to serve a copy of the notice of appeal and statement of reasons for appeal on Peabody Coal Company and the Hopi and Navajo Tribes. By order of March 24, 1976, this Board ordered service on Peabody Coal Company and the Hopi and Navajo Tribes of the various documents previously filed with the Board. Subsequent to that order, those parties were served with the documents.

On April 29, 1976, attorneys for the Navajo Tribe filed a submission in which they requested that the Board grant the relief which DNA sought. After obtaining various extensions of time, attorneys for the Hopi Tribe filed a brief on August 30, 1976, in which it opposed the position taken by DNA, arguing, inter alia, that DNA lacked standing

to prosecute an appeal, that the appeal was not timely, and that appellant DNA had failed to exhaust its administrative remedies.

On November 1, 1976, Peabody Coal Company filed its answer to appellant's statement of reasons for appeal. In its answer Peabody argues that DNA had failed to proceed according to Departmental rules of appeal and that DNA lacked the requisite standing to maintain the appeal. Peabody further argues alternatively that the requirements of 25 CFR 177 do not apply to its leases, or, if the Board should find that the regulations do apply, the mining plan which it voluntarily submitted in 1970 does satisfy the regulatory requirements.

Having considered all of appellant's, appellee's and intervenors' arguments, we have reached the conclusion that the appeal of DNA must be dismissed for two discrete reasons.

[1] First, appellant has failed to follow the mandatory procedural requirements found in 43 CFR Part 4 and 30 CFR Part 290. This Board is not possessed with general supervisory authority over constituent agencies within the Department. Until its jurisdiction is properly invoked, the Board is without power to act in any matter. Herein DNA has sought, in effect, to appeal a decision made in 1970. The Board's regulations concerning the timeliness of appeals are both explicit and mandatory. Indeed, the caption of 43 CFR 4.411 reads as follows: "Appeal; how taken, mandatory time limit." (Emphasis supplied.) The relevant part of that regulation is as follows: "[T]he notice of appeal * * * must be transmitted in time to be filed in the office where it is required to be filed within 30 days after the person taking the appeal is served with the decision from which he is appealing." (Emphasis supplied.)

DNA cannot avoid this time problem by calling its requested relief a "rescission" of the original approval. Under this theory the time limit for filing notices of appeal would become nonexistent. Any party which failed to proceed timely would merely request that the decision to which it objected be rescinded, and when its request was denied it would appeal from the denial.

Moreover, even assuming that DNA could appeal from a decision refusing to rescind approval of a mining plan, it still has failed to perfect its appeal in conformity with the Departmental appellate regulations.

This case arises under 30 CFR Part 290. 2/ That regulation provides in relevant part: "An appeal to the Director, Geological Survey [and the Commissioner, Bureau of Indian Affairs], may be taken by filing a notice of appeal in the office of the official issuing the order

2/ Compare 43 CFR Part 23.

or decision within 30 days from service of the order or decision." 30 CFR 290.3(a).

We first focus on what decisions within GS and within BIA were the subject of the appeal to the Director and the Commissioner, respectively. In reference to GS, the record indicates that DNA's letters of August 1974 and June 1975 were never answered. There is no provision in the regulations which allows an appeal to lie where there has been no decision. If the letter from the Acting Director, GS, dated August 26, 1975, is deemed the appealable decision, DNA's letter of November 6, 1975, to the Secretary failed to meet the requirements for appeal set out in 30 CFR Part 290: (1) it was not filed within the mandatory 30-day period (30 CFR 290.3, 290.5); (2) it was not filed with the official who issued the decision being appealed (30 CFR 290.3(a)); and (3) it was not accompanied or followed by a written showing and argument to justify reversal or modification of the order or decision (30 CFR 290.3, 290.5). We have held that compliance with the appellate review procedures of GS is essential in order to obtain review by this Board. Robert B. Ferguson, 23 IBLA 29 (1975).

Alternatively, DNA may argue that the letter it received on January 5, 1976, from the Acting Director, GS, is the decision appealed from, and, since its appeal to this Board was timely filed (January 29, 1976) and properly served on all parties, should be considered on its merits. We disagree. As stated at the outset, Departmental responses to repeated requests to rescind a decision cannot vitiate or indefinitely postpone the requirement to comply with the Department's appellate procedures.

If, because its letter of November 6, 1975, was addressed to the Secretary, DNA assumes that the response on January 5, 1976, was a Secretarial response, no appeal may lie to this Board, since the regulation defining the Board's review authority expressly declares: "Except * * * where a decision has been approved by the Secretary, any party to a case who is adversely affected * * * shall have a right to appeal to the Board." 3/ (Emphasis supplied.) 43 CFR 4.410.

The procedures followed in relation to obtaining review from a decision of the Commissioner, BIA, are even more deficient. The applicable regulation, 30 CFR states: "The procedure for

3/ That DNA is somewhat confused about this aspect is obvious from the fact that it attempted to appeal the decision of "Thomas S. Kleppe," then Secretary of the Interior, to this Board. Clearly, this Board has no authority to overrule a Secretarial decision rendered in a specific case. Our view of the instant matter is that the letter signed by the Acting Director, GS, on January 5, 1976, was not a Secretarial decision within the contemplation of the regulations, and, thus, not for that reason a bar to our consideration of the matter.

appeals under this part shall be followed for permits and leases on Indian land except that with respect to such permits and leases, the Commissioner of Indian Affairs will exercise the functions vested in the Director, Geological Survey." DNA, however, can point to no decision from anyone purporting to act for the Commissioner. The letter which it received from the Acting Assistant Area Director, dated October 8, 1975, does not constitute a decision by the Commissioner, as is necessary to trigger the right to appeal to this Board under 30 CFR 290.7.

Additionally, 25 CFR 2.10(a) requires a notice of appeal to be filed in the office of the officer who made the decision from which an appeal is sought to be taken within 30 days of receipt of the decision. Once again, appellant failed to comply with this mandatory regulation. See 25 CFR 2.10(b).

This case is thus not properly before us, and dismissal of the appeal is required by the applicable regulations. See Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969); Pressentin v. Seaton, 284 F.2d 195 (D.C. Cir. 1960).

[2] Moreover, on December 10, 1973, the Under Secretary concurred in the approval by the Acting Director, GS, of amendments to the mining plan for lease No. 14-20-0603-8580. Regarding that lease this Board has no authority to reverse the approval of the mining plan, since for the purpose of 43 CFR 4.410, the Under Secretary is vested with the authority of the Secretary to make decisions final for the Department.

Although we dismiss this appeal on procedural grounds for the above reasons, we wish also to address briefly the substantive issues raised by DNA.

DNA argues principally that the regulations on surface exploration, mining, and reclamation of Indian lands found at 25 CFR Part 177 apply to the mining operations of Peabody under the leases at issue and that Peabody's mining plan does not meet the requirements of Part 177 and should be rescinded. Additionally, DNA contends that GS and BIA failed to undertake the technical examination and to formulate general requirements for Peabody's operations as required by the regulations. 4/

4/ When 25 CFR Part 177 was originally promulgated and when this appeal was initiated, Part 177 consisted of sections 177.1 through 177.12 only. These sections were designated Subpart A in 1977 in conjunction with the promulgation of Subpart B, Coal Operations, 25 CFR 177.100 through 177.114 following passage of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 through 1328 (Supp. 1977).

Contrary to DNA's assertion, the regulations in Subpart A of Part 177, by their own terms, do not apply to the leases. They state that the regulations "shall apply only to permits or leases issued subsequent to the date on which these regulations become effective and which are subject to the approval of the Secretary of the Interior or his designated representative." (Emphasis supplied.) 25 CFR 177.2(c). Subpart A of Part 177 was originally promulgated on January 18, 1969. The Peabody leases on Black Mesa were issued in 1964 and 1966. Thus the regulations in Subpart A do not govern the Peabody leases.

DNA urges that the terms of the mining leases themselves provide for application of 25 CFR 177.1 through 177.12. The pertinent provision reads:
"Lessee shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including but not limited to applicable provisions of 30 C.F.R. 211 and 25 C.F.R. 171; * * *." (Emphasis added.) DNA focuses on the phrase "now or hereafter in force" to argue the applicability of Part 177 to Peabody's leases, but ignores the qualification "relative to such leases." However, by the language of 25 CFR 177.2(c) previously quoted, the regulations in Subpart A of Part 177 are not "regulations * * * relative to [the Peabody] leases."

We would also add that examination of 25 CFR 177.1 through 177.12 provides an obvious explanation for prospective application only of these regulations. The program of surface mining control set up by these regulations begins with a technical examination of areas identified in coal lease applications and the formulation of general requirements for the protection of nonmineral resources and the reclamation of the land which the applicant must agree to before the lease is issued. The requirements are then incorporated into the lease terms. 25 CFR 177.4. Thereafter, before surface operations may begin, 25 CFR 177.7 requires that the mining operator file a mining plan consistent with the requirements. Logically, previously issued leases such as Peabody's can not be brought under procedures which are imposed prior to lease issuance. There is no provision for the review of existing leases and no authority for rescinding such leases in order to impose such procedures.

Under the GS regulations governing coal mining operations which do apply to Peabody's leases, 30 CFR Part 211, Peabody was required to submit for approval a preliminary development plan before beginning operations. 30 CFR 211.19. Unlike 25 CFR Part 177, 30 CFR Part 211 does not provide a detailed list of components for the plan. The Peabody plan when submitted in 1970 was tailored to the requirements for mining plans found in 25 CFR 177. DNA argues that the plan was deficient under the guidelines set forth in 25 CFR 177.7. On that point, although we have found that Subpart A, 25 CFR Part 177, is not applicable to Peabody's leases, and therefore, DNA's arguments are unavailing, the promulgation in 1977 of Subpart B of 25 CFR Part 177

detailing performance standards for all coal mining operations on Indian lands under existing and new contracts will result in review and close monitoring of the Peabody operations with respect to the issues of concern to DNA. See 25 CFR 177.100 through 177.114.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed for the reasons set out above.

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James L. Burski
Administrative Judge

I concur:

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Douglas E. Henriques
Administrative Judge

FREDERICK FISHMAN, CONCURRING SPECIALLY

I heartily agree that the appeal must be dismissed for procedural defects. See Union Oil Co. of Calif., 48 IBLA 145 (1980), but it seems to me it would be appropriate to withhold the obiter dicta discussion whether the regulations pertaining to surface exploration, mining and reclamation of Indian lands, 25 CFR 177, govern Peabody's leases in issue. The resolution of such an important environmental issue should not be decided until it is crucial to the resolution of an appeal. Hopefully, in those circumstances, the issue will be briefed in extenso.

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Frederick Fishman
Administrative Judge